

STATE OF MICHIGAN
COURT OF APPEALS

WOODS OF PARDEE HOMEOWNERS
ASSOCIATION, INC.,

UNPUBLISHED
April 17, 2012

Plaintiff-Appellee,

v

No. 302162
Wayne Circuit Court
LC No. 09-027700-CH

PHILLIP MICHELS and BONNIE MICHELS,

Defendants-Appellants.

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

The circuit court summarily granted plaintiff Woods of Pardee Homeowners Association, Inc. (the Association) an injunction, requiring defendant homeowners, Phillip and Bonnie Michels, to take down the fence they erected in violation of their deed restrictions. We affirm based on the plain language of the deed restrictions document.

The Michels own subdivision property that is governed by deed restrictions, including a prohibition on fences that enclose or partially enclose a lot. In 2004, the Michels unsuccessfully sought Association approval to erect a fence. In 2009, the Michels decided to erect a fence on their lot without first seeking approval.¹ Association president Kenneth Bittell advised the Michels “to cease and desist” the construction “because it violated the Restrictions on fences” but the Michels disregarded the warning. The Association’s board of directors then unanimously approved the filing of this action for an injunction to require the Michels to remove the fence.

The Michels fought the injunction action, arguing that the Association had waived its right to enforce the fence restriction by failing to take legal action against other offenders. They further argued that the Association had not followed proper protocol before instituting legal action.

¹ The Michels also constructed a pond on their property without seeking permission. The Association has not sought an injunction to force the Michels to remove the pond. We note, however, that the Michels were required to submit plans for this “Improvement” to the Association’s “Architectural Review Committee” for approval.

The Association ultimately sought summary disposition pursuant to MCR 2.116(C)(10), arguing that the Michels' installation of a fence in knowing violation of the deed restrictions entitled it to relief. The Association asserted that it did not waive its right to pursue an injunction against the Michels by deciding against expending funds on legally enjoining earlier fence installations. Specifically, the deed restrictions document provides that "failure by the Association or any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter." The Association also contended that its board had properly approved the filing of the injunction action.

The circuit court granted the Association's motion and entered an injunction requiring the Michels to remove the fence, noting simply that there were not "any genuine issues of material fact." Summary disposition is proper under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We also review issues of contract interpretation de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

"A deed restriction represents a contract between the buyer and seller of property." *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007). And it is "[a] fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be enforced as written." *Rory*, 473 Mich at 468. The parties' deed restrictions expressly provide: "No fence or wall of any type shall be permitted for the purpose of enclosing or partially enclosing any Lot. Wrought iron fencing . . . may be used on any Lot for the purpose of enclosing a permitted swimming pool, in locations approved by the Committee." The deed restrictions strictly forbid the erection of fences to enclose a lot. The Michels admit that their fence violates this provision.

The Michels contend that the Association waived its right to enforce the deed restriction because it had allowed other landowners to erect fences without legal challenge. We must enforce unambiguous deed restrictions with very few exceptions, such as when the right to enforce the restriction "has been waived by acquiescence to prior violations," or when "the restriction contravenes law or public policy." *Bloomfield Estates*, 479 Mich at 214. However, the deed restrictions document specifically provides that failure to enforce a restriction "shall in no event be deemed a waiver of the right to do so thereafter." By the plain language of the parties' contract, and under the facts of this case, the Association's earlier inaction is irrelevant.² The Association did not waive its right to enforce the fence restriction against the Michels.

The Michels continue to argue that there is a question of fact concerning whether the Association authorized the commencement of this lawsuit. Yet, the Michels have never submitted any factual support for this claim. Conversely, the Association submitted an affidavit

² We do not intend to imply that the Association has *carte blanche* to arbitrarily and capriciously reject certain homeowners' requests to avoid the deed restrictions while ignoring the violations of others. Rather, based on the record evidence, there simply is no indication that the Association arbitrarily enforced the deed restrictions against the Michels.

indicating that its board of directors unanimously approved the filing of this lawsuit. Accordingly, the Michels' challenge must fail.

The Michels also assert that they conducted a survey of subdivision homeowners and found that a majority would approve their fence. The Michels have not established that the personal views of the individual homeowners are legally relevant. The undisputed evidence shows that the Association's board of directors is authorized to enforce the deed restrictions and did so.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher